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No. 82-1173

IN THE

Supreme Court of the United States

October Term 1982

UNDERWRITERS AT LLOYDS,

Petitioners,

-against-

OPE SHIPPING, LTD., and EL PORVENIR SHIPPING COMPANY, INC., et al.

UNDERWRITERS AT LLOYDS,

Petitioners,

-against-

VADOR SHIPPING, LTD., and CIA DE NAVEGACION LA LIBERTAD, S.A., et al.

UNDERWRITERS AT LLOYDS,

Petitioners,

-against-

AGUA SHIPPING, LTD., and CIA DE NAVEGACION CORINTO, S.A., et al.

UNDERWRITERS AT LLOYDS,

Petitioners,

-against-

DURAS SHIPPING, LTD., and MARINO MERCANTE NICARAGUENSE, S.A., et al.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The very arguments submitted by the respondents' Brief in Opposition hereto completely prove the clear and present mandate to this Court that a Writ of Certiorari must be granted to untangle the tangled web woven below.

From the outset, respondents realized that the only possible way to vindicate the Second Circuit was to deny that the Court said what it did say; and, at the same time, to endeavor to keep a safe corporate distance between General Somoza and all the owning corporations of the vessels in suit. Respondents also had to ignore Cuba and Panama for purposes of confiscation and detention, which proved to be an impossible task in view of the factual record contained in the opinion sought to be reviewed.

SOMOZA AND THE VESSELS

On pages 4 and 6 of the Opposing Brief, respondents deny that Somoza was the real party in interest with respect to the vessels, and further deny that he dominated or used the owning corporations for his own purposes. The District Court found as a fact that the vessels belonged to Somoza (App. A p.A-11), and even the Second Circuit begrudgingly found that the corporations were "all apparently under the control of General Anastasio Somoza (App. A. p.A-2). However the Second Circuit did not attempt to reach the issue of corporate "domination" because it had already violated its own maritime standard for corporate veil piercing as more thoroughly discussed in our Petition (p.9-10).

Nevertheless what clearer evidence could be found to prove complete domination and control by Somoza over the vessels, over the owning corporations, and over the insurance policies in suit, than as set forth in Somoza's letters to Mr. Baittiner (App. A p.A-28, A-29)? In fact, the very tone of language used by Somoza only tends to ridicule the subsequent language of the Second Circuit in rejecting the findings of sham by the District Court with respect to contractual consideration or payment i.e. "Where, as here, the parties to a conveyance are satisfied with their bargain***" (App. A p.A-7). How could any

responsible tribunal reading that language in 1982 fail to conclude that, during the material times in question, *there could be only one party to that conveyance, i.e. Somoza trying to protect his assets.*

PANAMA AND CUBA

The Second Circuit found as facts that the HOPE was taken by the crew on June 17, 1979 to Puerto Nuevita, Cuba where it was boarded by the Cuban National Guard, who sailed it to Mariel, Cuba; and that the EL SALVADOR, HONDURAS, and MANAGUA, were taken by the crews to Panama on or about June 22, 1979 where the Panamanian Maritime National Guard took control of the vessels (App. A p.A-3, A-4). The Second Circuit also found as fact that the ships could not have been recovered from Cuba and Panama because of the ships' connection with Somoza (App. A p.A-9). Despite this clear language to the contrary, plaintiffs nevertheless argue at page 4 of the Opposing Brief that "Neither the district court, nor the court of appeals made any such finding".

Respondents' argument on this point becomes even more blatantly erroneous when viewed against the fact that the Second Circuit based its finding on the testimony of Mr. Renaldy Guttierrez, who testified at trial as the President of the Cayman Island Corporations, wherein he succeeded the late Mr. Baittiner. That same testimony of Mr. Guttierrez also convinced the Second Circuit to conclude for sue and labor purposes that "Plaintiffs' agent did petition the Panamanian Ministry of Foreign Affairs for recovery of the three ships detained there, but without success". (App.A p.A-9). Even though the finding was made by the Second Circuit in rejecting the sue and labor argument never raised by petitioners at trial or on appeal, respondents now argue in opposition herein that the Second Circuit did not say that the vessels "detained" in Panama were "detained" by Panama.

The Second Circuit not only held that the vessels were "detained" by Panama as of June 22, 1979 (App.A p.A-9) but it also held that two of the vessels "detained" were owned by Panamanian corporations as of June 22, 1979, with the alleged transfers of title not being effective until July 9, 1979 (App.A p.A-3). Having overruled the District Court on the legitimacy of the entire transfer transaction, the Second Circuit went on to hold

that Nicaragua was not the country of ownership or registry for purposes of confiscation or detainment under the War Risk Clauses because the Cayman Islands was the country of ownership as of July 9, 1979, and the country of registry as of July 13, 1979 (App.A p.A-6). Therefore by disregarding all the credible evidence before the District Court to the contrary, the Second Circuit found a valid transfer of title on July 9, 1979 from Somoza-Nicaragua to Somoza-Cayman Islands but conveniently overlooked its earlier finding that Panama was the country of ownership when the EL SALVADOR and MANAGUA were detained by Panama on or about June 22, 1979.

As of June 22, 1979, the EL SALVADOR and MANAGUA were owned by Panamanian corporations but were being "detained" by the Government of Panama, whom the Second Circuit held was not going to return the vessels, neither to Somoza nor to the Panamanian corporations, because Panama had no sovereign scruples about piercing the corporate veils of corporations existing by virtue of Panamanian laws. Despite repeated rehearing requests, the Second Circuit refused to recognize, nevermind repudiate, the ambiguities in its own appellate language with respect to the EL SALVADOR and MANAGUA because that also would have entailed a complete review of its obvious erroneous reasoning throughout. Small wonder that respondents at page 10 of the Opposing Brief, had to try and distinguish the ambiguous appellate language between "ordinary descriptive words" as opposed to "findings of excluded events within the meaning of the War Risk policy exclusions", which was the very burden assumed by the Second Circuit when limiting its appellate review to one excluded event rather than testing its own findings of fact against each of the excluded events.

CONFISCATION AND DETENTION.

In point of fact, the Second Circuit's failure to test its findings that the vessels were "detained" by Panama against each of the excluded events completely erodes the validity of its contrived conclusion that the vessels were not "confiscated" by Nicaragua without applying its own test of retroactive validation. The barreness of its appellate review is further evidenced by respondents' apology that the Court merely was using ordinary descriptive words which, unfortunately, also happened to be

used in the exclusionary language supposedly under review. Therefore, according to respondents' misinterpretation, the Second Circuit not only held that Nicaragua did not "confiscate" the vessels but also held that Panama did not "detain" them, which is a sad commentary not only on the lack of lucidity in judicial language but, more particularly with respect to the certain inefficacy of that judicial language for future precedential purposes.

The sad fact remains that, because it distorted "ordinary descriptive words" far beyond their common sense meaning, the Second Circuit arrived at a completely meaningless conclusion. The ordinary descriptive meaning of confiscation is the taking of property without compensation, and the vessels were taken from Somoza and/or the owning corporations as of June 17th and 22nd, 1979 without compensation or any hope thereof; and eventually were sold by Nicaragua to offset unpaid accrued port charges which, in some circles, could be considered as a bit of subtle irony, i.e. "come home Somoza, and we'll give you back the ships!". To hold that the vessels were not taken from Somoza without compensation by Nicaragua because the Attorney General did not issue a Confiscation Order pursuant to a Decree that did not require it, is completely and patently absurd.

In summary, the reasoning of the Second Circuit with respect to the War Risk exclusionary language was completely erroneous because, for better or for worse, Somoza could not be divorced from the vessels; Cuba and Panama could not be divorced from the Sandinistas; and confiscation could not be divorced from capture, seizure, arrest, or detainment. The American War Risk Clauses were entitled to, but did not receive a well reasoned judicial interpretation of that exclusionary language for continued use in international commerce. The appellate failure below now can be rectified only by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted
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